August 13, 2020

U.S. Citizenship and Immigration Services
Department of Homeland Security
Office of the Director
20 Massachusetts Ave., NW
Washington, DC 20529-2140

Submitted via e-mail: **USCISPolicyManual@uscis.dhs.gov**

**Re: Opposition to Changes to USCIS Policy Manual, Applying Discretion in USCIS Adjudications, 1 USCIS-PM E.8 and 10 USCIS-PM A.5**

Dear Director:

The American Immigration Lawyers Association and the American Immigration Council submit the following comment in response to the July 15, 2020 Policy Alert from U.S. Citizenship and Immigration Services ("USCIS") regarding the above-referenced consolidation of existing policy guidance in the USCIS Policy Manual regarding officers' application of discretion in adjudications.[1]

The American Immigration Lawyers Association ("AILA") is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council ("Council") is a nonprofit organization that strengthens America by shaping how America thinks about and acts towards immigrants and immigration. In addition, the Council works toward a more fair and just immigration system that opens its doors to those in need of protection and unleashes the energy and skills that immigrants bring. The Council envisions an America that values fairness and justice for immigrants and advances a prosperous future for all.

[1] *See* U.S. CITIZENSHIP & IMMIGRATION SERV., DEP'T OF HOMELAND SECURITY, PA-2020-10, USCIS PUBLIC SERVICES (JULY 15, 2020), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf.

On July 15, 2020, USCIS released a Policy Alert notifying stakeholders of updates to the USCIS Policy Manual related to the application of discretion in USCIS adjudications.[2] Although the Policy Alert frames the changes to the Policy Manual as a consolidation of existing guidance to adjudicators, the changes are, in fact, material and substantive modifications of long-standing adjudication practices. They are both beyond the statutory and regulatory authority of USCIS and so significant that they demand formal pre-implementation review through publication in the *Federal Register* with prior notice and an opportunity to comment. On a more fundamental level, the Policy Guidance provides scant practical guidance to adjudicators in the daily exercise of discretion which will inevitably infuse additional confusion, delay, inconsistency, subjectivity and potential abuse of discretion into the already inefficient adjudications process.

For the reasons below, we urge USCIS to rescind these revisions to the Policy Manual immediately and reimplement the previous Adjudicator's Field Manual guidance with respect to discretion. Doing so will ensure that the Policy Manual does not exceed the scope of agency authority and provide meaningful assistance to officers in the adjudication of applications and petitions.

## I. Overarching Comments About the Policy Guidance

The framework set up by this guidance for benefits subject to discretion describes three distinct steps to review. First, officers must engage in fact-finding related to a benefit request, which will apparently include examining both substantive eligibility documentation and evidence relevant to a determination of whether an exercise of discretion is appropriate. Second, the officer must determine if, after review of the facts, the benefit request meets the applicable adjudicative evidentiary burden for eligibility, which is typically a preponderance of the evidence.

The third step then requires USCIS officers to adjudicate, as a "separate component" of the process, whether the benefit request should be approved as a matter of discretion.[3] This discretionary review analysis requires officers to "weigh all positive factors present in a particular case against any negative factors in the totality of the record."[4] Because of the specific structure of this three-step process, discretionary review will typically only occur after a benefit request has been determined to be substantively approvable. Thus, once the benefit request has reached the discretionary review stage, the adjudications process will morph from an objective analysis of evidence of eligibility into an investigation into whether potential grounds for denial exist.

Despite this patina of structure created by the three-step process, the Policy Manual is vague as to how USCIS officers are supposed to conduct this investigation into potential grounds for denial and, more specifically, how to weigh the positive and negative factors, noting merely that "precedent case law provides guidance" on how to review discretion.[5] The Policy Manual contains a "non-exhaustive" list of factors to consider that includes, in a striking example of circular

[2] *Id*.
[3] *Id.*
[4] USCIS Policy Manual, Volume 1, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 3, Weighing Factors.
[5] USCIS Policy Manual, Volume 1, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 2, Identifying Discretionary Factors.

reasoning, eligibility for the benefit sought as one of the factors. The "clearest" instruction given to adjudicators is as follows:

> There is no formula for determining the weight to be given a specific positive or negative factor. Officers should not attempt to assign numbers or points to a specific factor to determine if one factor is more or less favorable than another. Officers should consider each factor separately and then all the factors as a whole. The negative and positive factors should be balanced against each other and then evaluated cumulatively. The weight given to each factor may vary depending on the facts of a particular case as well as the relationship of the factor to other factors in the analysis.[6]

Other ambiguities abound. For example, for applicants who may have negative factors, how much positive factor documentation is needed to warrant the exercise of discretion? Another example of ambiguity is that one discretionary factor is "hardship due to an adverse decision," but the Policy Manual is silent as to what level of hardship is required and who must experience it. Inevitably, this lack of clarity will require each adjudicator to create their own inherently subjective discretionary eligibility abacus unique from their coworkers. Inconsistency will be the only consistent outcome if the Policy Manual's guidance to adjudicators on the exercise of discretion is not rescinded.[7]

In addition, if this guidance is fully applied by adjudicators (particularly without more clarity as to implementation) to petitions and applications pending with USCIS long before publication, the already overburdened agency will necessarily need to send out countless Requests for Evidence (RFEs), and will be overwhelmed by the tsunami of RFE responses which it has little capacity to absorb.

To mandate this formal three-step approach at a time when the agency is struggling to provide timely processing of basic services (e.g., issuing permanent resident and employment authorization cards to approved applicants) suggests that efficient and fair adjudications and the proper exercise of discretion will be degraded, rather than enhanced, by this guidance. For these reasons, the updated Policy Guidance should be immediately rescinded and replaced with the previous guidance on discretion until such time as the agency is able to implement new guidance in a clear and consistent manner that does not adversely affect its basic ability to function.

## II. Contrary to the Policy Manual change, Petitions to Classify a Noncitizen as an Employment-Based Immigrant are not subject to an exercise of USCIS Discretion

In Policy Manual Volume 1, Part E, Chapter 8, Section A. Applicability, USCIS correctly notes,

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[6] USCIS Policy Manual, Volume 1, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section C, Adjudicating Discretionary Benefits, Subsection 3, Weighing Factors (footnote omitted).

[7] Prior guidance on the exercise of discretion published in the Adjudicator's Field Manual (Chapter 10.15 Exercise of Discretion; Uniformity of Decisions) expressly instructed, "[d]iscretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, **require** supervisory review." (emphasis added). Disturbingly, the Policy Manual guidance now eliminates this sage counsel, thus leaving officers further adrift in their efforts to interpret case law and regulatory guidance in a manner that is both consistent and fair.

> Congress generally provides discretionary authority explicitly in the statutory language that governs an immigration benefit. … Certain immigration benefits are not discretionary. In these cases, if the requestor properly filed and meets the eligibility requirements then USCIS must approve the benefit request. There is no discretionary analysis as part of the adjudication, and these requests cannot be denied as a matter of discretion.

Thus, to determine whether a specific immigration benefit is subject to agency discretion, it is imperative to examine the relevant statutory language for that visa category. With respect to employment-based immigrant visa petitions pursuant to 8 USC 1153(b), section 1154(b) is controlling and is unequivocal in describing USCIS' non-discretionary authority:

> **After an investigation of the facts in each case,** and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(b)(2) or 1153(b)(3) of this title, **the Attorney Genera**l **shall**, **if he determines that the facts stated in the petition are true and that the [noncitizen] in behalf of whom the petition is made** is an immediate relative specified in section 1151(b) of this title or **is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition** and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status. (emphasis added)

This language is clear, unambiguous, and not subject to inference or interpretation. If the petitioner meets its burden of proof with respect to the specific employment-based immigrant category, USCIS must approve the petition.[8] To apply a discretionary review analysis to employment-based immigrant visa petition adjudications is directly contrary to statutory authority. To comport with the law, this chapter of the Policy Manual must be immediately rescinded and replaced with guidance eliminating any reference instructing that all employment-based petitions are subject to a discretionary review analysis.

## III. The Policy Manual's Change requires clarification as to Form I-129, Petition for a Nonimmigrant Worker

In its new chart of immigration benefit types involving discretionary review, USCIS identifies the petition for nonimmigrant worker (Form I-129) as not involving discretion in adjudication "with some exceptions."[9] There is no subsequent indication in the Policy Manual or its accompanying footnotes as to what those exceptions might be. Statutory language in 8 USC §1184(c) and most

[8] This analysis generally applies to all employment-based immigrant visa petitions, including employment creation petitions pursuant to 8 USC §1153(b)(5). In contrast to the non-discretionary language in 8 USC §1154, two circuit courts have concluded that the language of the national interest waiver in 8 USC §1153(B)(2)(B)(i) ("the Attorney General may, when the Attorney General deems it to be in the national interest, waive …") makes the waiver decision discretionary. *Poursina v. USCIS*, 936 F.3d 868, 871 (9th Cir. 2019); *Zhu v. Gonzales*, 411 F.3d 292, 294 (D.C. Cir. 2005).

[9] USCIS Policy Manual, Volume 1, Part E, Adjudications, Chapter 8, Discretionary Analysis, Section A, Applicability, & n.8.

of the regulations issued under the authority of 8 USC §1184(a) do not authorize discretionary action in adjudicating Forms I-129. Officers and petitioners need to know which employment-based nonimmigrant categories USCIS thinks involve discretion in adjudication. Based on USCIS' characterization of the immigrant visa petition categories, petitioners cannot assume that USCIS will stay within the limits of its authority.

## IV. Policy Manual Changes are Inconsistent with Longstanding Adjudication of Employment Authorization Applications

In a departure from long-established agency interpretation, the Policy Guidance at Volume 10, Part A, Chapter 5 imposes the three-step process for discretionary analysis on nearly all categories of employment authorization documents (EADs) within 8 CFR §274a.12(c). This is a deviation from long-established agency interpretation, is fundamentally bad policy, and should be immediately rescinded. Given both the inherent ambiguity of the guidance on applying discretionary analysis referenced above and the specific and disparate circumstances of several employment authorization categories, serious concerns arise.

Initially, in the adjustment of status context it has been the long-standing policy of USCIS to adjudicate Forms I-765 (Application for Employment Authorization) (as well as Forms I-131 requesting advance parole) as ancillary filings if the underlying application for adjustment of status (Form I-485) was properly filed. In the employment-based scenario, the foreign national has typically been the beneficiary of an approved labor certification application and employment-based immigrant visa petition and has had many years of employment authorization in a nonimmigrant visa category. When applying for adjustment of status, the issuance of employment authorization was routinely granted so that the beneficiary would retain employment authorization throughout the period of time USCIS required to adjudicate the adjustment of status application. Applications were routinely granted as a practical acknowledgement that agency processing times would create a gap in employment authorization for otherwise eligible, future lawful permanent residents. To inject a discretionary review analysis that lengthens and complicates this process is unwise and unworkable, particularly as the in-person interview requirement for all employment-based adjustment of status applicants have significantly lengthened an already protracted process.

In addition, some categories of EAD applicants will naturally have one or more negative factors. For example, while the majority of adjustment of status applicants all have a lawful entry, a positive factor, those receiving Deferred Action for Childhood Arrivals (DACA) or other types of deferred action have often entered without inspection, a negative factor. Will these applicants ultimately be eligible for adjustment of status but ineligible for employment authorization that may enable them to survive economically while that adjustment application is pending? Also, for EAD applications based on DACA, will negative factors not considered for substantive eligibility for adjustment of status need to be addressed with positive supporting documents for EAD eligibility?

Also, if someone is granted discretion in receiving the underlying benefit, there should not be a separate discretionary analysis for the EAD from which it derives. If the facts are the same, the outcome should be as well. For example, once the threshold decision has been made to approve a DACA application, why must an officer again go through the analysis for the employment authorization application? This is inefficient and unwise for applicants and USCIS.

Chapter 5 of the Policy Manual is silent on these points and adjudicators will thus be relegated to navigating the vagaries of the Chapter 8 – Discretionary Analysis with no adjudicative compass to determine the proper and just path forward. Once again, inconsistency will be the only consistent outcome. For these reasons, the updated Policy Guidance should be immediately rescinded and replaced with the agency's previous guidance on discretion.

## V. Conclusion

The Policy Manual's recent changes to USCIS guidance regarding officers' application of discretion in adjudications are far more than a mere consolidation of existing guidance, as was indicated in the July 15, 2020 Policy Alert. The changes include substantive and material modifications to established adjudication policies that are contrary to express statutory and regulatory provisions. The changes are also of such little specificity that they are unlikely to be of meaningful value to adjudicators in the performance of their responsibilities.

Accordingly, we urge USCIS to rescind the revisions to the Policy Manual immediately and reimplement the previous guidance on discretion. Further, we urge USCIS to refrain from reintroducing the guidance until it is revised to ensure that it does not exceed the scope of agency authority and provides meaningful assistance to officers in the adjudication of applications and petitions for immigration benefits. We also encourage USCIS to engage in a formal pre-implementation review through publication in the *Federal Register* with prior notice and an opportunity to comment. This would enable stakeholders to work with the agency to develop guidance that will provide clarity and consistency in the adjudication of discretionary benefit requests both to applicants for immigration benefits and the USCIS employees who adjudicate those requests.

Respectfully submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL